89-281

Supreme Court, U.S.
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AUG 15 1989
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CLERK

No.

In the

Supreme Court Of The United States

October Term, 1989

KENNETH KEEL,

Petitioner

vs.

THE STATE OF ALABAMA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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QUESTIONS FOR REVIEW

I. WHETHER PETITIONER WAS EGREGIOUSLY DENIED DUE PROCESS OF LAW AND THE RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL THROUGHOUT THE STATE OF ALABAMA'S CRIMINAL PROCEEDING AGAINST HIM. SPECIFICALLY, WHETHER THE ADMISSION OF TAPE RECORDED CONVERSATIONS ALLEGEDLY BETWEEN THE DEFENDANT AND A CONFIDENTIAL INFORMANT, THE IMPROPER IMPEACHMENT OF THE DEFENDANT'S WITNESS, AND THE STATE GOING INTO DETAILS OF THE PRIOR CONVICTION OF THE DEFENDANT'S WITNESS SEPARATELY AND SEVERALLY RENDERED THE PROCEEDING A TRAVESTY OF JUSTICE AND A MOCKERY OF FUNDAMENTAL FAIRNESS.

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No. \

In the

Supreme Court Of The United States

October Term, 1989

KENNETH KEEL,

Petitioner

vs.

THE STATE OF ALABAMA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court on June 16, 1989, denying review of the issues raised concerning his conviction in this case, previously affirmed without opinion by the Alabama Court of Criminal Appeals by Judgment on March 17, 1989.

OPINIONS BELOW

Petitioner timely appealed his judgment of conviction and sentence to the Alabama Court of Criminal Appeals. By Judgment of March 17, 1989, the Alabama Court of Criminal Appeals affirmed his conviction and sentence without opinion. Petitioner timely filed an Application for Rehearing in the Alabama Court of Criminal Appeals. This Application for Rehearing was denied without opinion by the Alabama Court of Criminal Appeals on April 14, 1989.

Petitioner timely filed a Petition for Writ of Certiorari to review the Judgment of the Alabama Court of Criminal Appeals in the Alabama Supreme Court. The Alabama Supreme Court by order of June 16, 1989, denied the Writ.

These orders appear in full in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3). This Petition was timely filed within sixty days of the date of the Alabama Supreme Court's Judgment and Order of June 16, 1989.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

The Sixth Amendment to the United States Constitution provides in full:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

The Petitioner was arrested on March 17, 1987, for the alleged sale of cocaine to an undercover police officer on February 5, 1987. This drug transaction was arranged by a confidential informant who accompanied the undercover officer, David Miller. (Vol. I, R-11 to R-20).[1] After the drug sale took place, Deputy Miller turned the sample over to Lieutenant Roy Harbin of the Gadsden Police Department, Vice and Narcotics Division. (Vol. I, R-19). Lt. Harbin testified at trial that he observed the Petitioner, Kenneth Keel, drive into the parking lot at the Midtown Warehouse Grocery and park beside the vehicle that Deputy Miller occupied. (Vol. I, R-45). At trial the State used tape recordings allegedly made of the Defendant and the confidential informant to set up a cocaine buy. The State attempted to use the tape recordings to impeach and/or refresh the recollection of the Defendant. (Vol. I, R-127, R-133). Defendant's counsel objected numerous times to the use of the tapes for any purpose whatsoever. (Vol. I, R-128, R-130, R-131, R-132, R-133, R-134, R-148, R-502, R-548, R-156, R-161 to 164, R-174, R-186, R-188, R-190, R-193, R-197). The trial court, however, overruled the Defendant's objection, and allowed the tape recording to be played. (Vol. I, R-174). The State attempted to impeach the Defendant's witness, Claude Lynn Mabrey, by showing that he had been convicted of a crime involving moral turpitude. (Vol. I, R-100 to R-102). The State also went into the particulars of Mr. Mabrey's conviction over the objection of the Defendant. (Vol. I, R-100 to R-102). The trial court overruled the Defendant's objection and allowed the State to cross-examine Mr. Mabrey as to specific acts of misconduct. (Vol. I, R-101). The Petitioner raised the above issues in briefs before the Alabama Court of Criminal Appeals and the Alabama Supreme Court. (Appendix hereto).

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[1] The record in this case consists of a two volume trial transcript, exhibits and pleadings numbered sequentially. This Petitioner refers to the trial record as "R-". Where materials referenced also appear in the Appendix to this Petition, that fact is noted.

REASONS FOR GRANTING THE WRIT

I. Petitioner Was Egregiously Denied Due Process Of Law And The Right To A Fair And Impartial Tribunal Throughout The State Of Alabama's Criminal Proceeding Against Him. Specifically, The Admission Of Tape Recorded Conversations Allegedly Between The Defendant And A Confidential Informant, The Improper Impeachment Of The Defendant's Witness, And The State Going Into Details Of The Prior Conviction Of The Defendant's Witness Separately And Severally Rendered The Proceeding A Travesty Of Justice And A Mockery Of Fundamental Fairness.

Petitioner submits that the record is clear that he was egregiously deprived of fundamental constitutionally protected rights throughout the course of the criminal proceeding against him in the Circuit Court of Etowah County, Alabama. Specifically, Petitioner asserts three points in the State of Alabama's proceeding against him, at which substantial deprivation of the constitutionally assured rights occurred: 1) at trial in the failure of the trial court to sustain the Defendant's objection to the admissibility of a tape recorded conversation allegedly between the Defendant and a confidential informant; 2) during trial by the court's failure to sustain the Defendant's objection by the State's attempt to impeach the Defendant's witness by showing that he had been convicted of a crime involving moral turpitude; 3) during trial by the court's failure to sustain the Defendant's objection to the State's going into details of the prior conviction of the Defendant's witness. Petitioner submits that each of these three instances represents a significant deprivation of his constitutional rights and each merits this Court's granting of the Writ. Petitioner also submits that each instance, as a strand in the whole, combines to form a proceeding that is constitutionally unacceptable and supports the granting of this Writ.

A. Petitioner Was Denied Due Process of Law And The Right To A Fair And Impartial Tribunal By the State of Alabama's Use of Tape Recorded Conversations Allegedly Between the Defendant and a Confidential Informant.

1. Facts

On February 5, 1987, the Gadsden Police Department, using a confidential informant, allegedly made a purchase of cocaine from the Defendant in the parking lot of a Gadsden grocery store. The informant, who was later revealed to be Claude Lynn Mabrey, came to police headquarters on the afternoon of February 5, 1987, and informed Lt. Roy Harbin that he had arranged to buy some cocaine from the Defendant. (Vol. I, R-40 to R-42). Two or three days before the date of the alleged transaction, Mr. Mabrey had made taped telephone calls to the Defendant from police headquarters. The recording device on which the two phone conversations were made was kept on Lt. Harbin's desk in the Vice and Narcotics Office at the police department. (Vol. I, R-179). At the time the recordings were made, the office was used by Officer Nessler, and two other full time officers with the police department. At the time that Mr. Mabrey made the phone calls, the recording device was new, and had not been used before. (Vol. I, R-182). The particular tape in question contained telephone conversations recorded over a thirteen month period in various cases. (Vol. I, R-180). No contemporaneous records were kept, nor was a log of transactions maintained. (Vol. I, R-146). Other recordings were made on the same tape over the thirteen month period, and other people had access to the tape and recording equipment. (Vol. I, R-147, R-178 to R-180).

Because the State failed to lay the proper predicate for the admission of the tape, the trial court erred in overruling the Defendant's objection to it being used. In addition, the tape is untrustworthy because of the thirteen month period when it was accessible to other people, and not shown to have been protected from error or spoliation.

2. *Deprivation of Due Process And The Right To A Fair And Impartial Tribunal By Admitting a Tape Recording Without the Proper Predicate Being Laid.*

Sound recordings are admissible only if a proper foundation has been laid for their admission. *Voudrie v. State,* 387 So.2d 248 (Ala.Cr.App.) *cert. denied,* 387 So.2d 257 (Ala. 1980). Guidelines for testing the admissibility of sound recordings was outlined in *Voudrie, supra.*

1. A showing that the recording device is capable of taking testimony.
2. A showing that the operator of the device was competent.
3. Establishment of the authenticity of the recording.
4. A showing that change, deletions, or additions have not been made.
5. A showing of the manner of preservation of the recording.
6. Identification of the speakers.
7. A showing that the testimony elicited was voluntarily made without any kind of inducement.

Proper safeguards must also be "shown to have been used as to protect the recording against error or spoliation and the speakers recorded are properly identified and adequate safeguards are taken to insure authenticity." *Walker v. State,* 416 So.2d 1083 (Ala.Cr.App. 1982), citing *Fikes v. State,* 263 Ala. 89, 81 So.2d 303, 311 (1955) *rev'd. on other grounds,* 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).

The State attempted to use the tape recordings to impeach and/or refresh the recollection of the Defendant. (Vol. I, R-127, R-133). The trial court overruled the Defendant's objection and allowed the tape recording to be played. (Vol. I, R-174). Although the State attempted to lay a predicate, it failed to meet the requisites of *Voudrie, supra.* Specifically, the State failed to show: 1) that the recording was capable of taking testimony; 2) that the operator was competent; 3) the authenticity and correctness of the recording; and 4) that changes, additions, or deletions had not been made. No statement was ever made as to how the recorder worked, how

it was hooked up, or whether it was working properly. The competency of the operator was never stated either. There is no way of knowing if or how the operator was trained to use the equipment, or his experience in using it. One can only draw an inference that since the tape recording equipment was new, that the operator was relatively inexperienced in using it. Because no contemporaneous records were kept, (Vol. I, R-146), there is also no means of establishing the authenticity or correctness of the recording, including any changes, additions, or deletions that may have been made. Sergeant Michael Nessler failed to keep a log of transactions recorded on the tape. There is no indication who was called, what date, or who dialed the number. We have only Sergeant Nessler's memory of what went on, and when. Therefore the authenticity and correctness of the tape cannot be proven. Although the State did show the manner of the preservation of the recording, what they showed was inadequate, because the tape in question stayed in the recorder for a thirteen month period before it was ever placed in the sole custody of Sergeant Michael Nessler. Other recordings were made on the same tape over this thirteen month period, and other people had access to the tape and recording equipment. (Vol. I, R-147, R-178 to R-180). It was not, therefore, protected against error or spoliation as required by *Walker, supra.* Because the State failed to lay the proper predicate for the admission of the tape as required by *Voudrie, supra,* the trial court erred in overruling the Defendant's objection to it being used. In addition, the tape is untrustworthy because of the thirteen month period when it was accessible to other people, and not shown to have been protected from error or spoliation as required by *Walker, supra.*

In this case, the State of Alabama's admission of the tape recording before a proper predicate had been laid, denied the Defendant's right to due process and fundamental fairness because the improper admission of the tape recording was extremely prejudicial and inflammatory to the Petitioner. No other procedural mechanisms were available to the Petitioner during his trial after the court allowed the admission of the tape recordings. In addition, the use of the

tape recordings at the Petitioner's trial was extremely prejudicial and inflammatory to the Petitioner, and unfairly biased the jury. It is an elementary component of due process that an accused be denied of his liberty by the State, only after a proceeding before a fair and impartial tribunal. In this case, however, by allowing the introduction of the improper tape recording, the State effectively denied the Petitioner's right to a fair and impartial tribunal by biasing and prejudicing the jury through the use of the improperly admitted tape recording.

A trial court has authority under the *Code of Alabama*, 1975 Section 12-16-233, to enter a judgment of mistrial "when in the opinion of the court or judge, there is a manifest necessity for the discharge or when the ends of justice would otherwise be defeated." The trial court has wide discretion in determining whether incidents occurring during the trial affect the rights of the parties to a fair trial. *Woods v. State*, 367 So.2d 982 (Ala. 1978); *Chilious v. State*, 405 So.2d 58 (Ala.Cr.App. 1981). The trial court in this case, however, abused its discretion by denying the Defendant's motion for a mistrial. (Vol. I, R-196). Defendant's counsel moved for a mistrial after the trial court allowed the State to play the tape recording of alleged conversations between the Defendant and a cocaine buyer. (Vol. I, R-188 to R-196). Because of the lack of credibility and improper predicate of the tape recordings, the Defendant objected to the use and contents of the recording as being immaterial, irrelevant, and misleading to the jury. In addition, the contents of the tape were inflammatory, and extremely prejudicial to the Defendant. All the State presented was a tape of alleged phone calls between the Defendant and a cocaine buyer with no indication or proof as to the dates of the calls, who the calls were between, or what they were in reference to. They were completely unreliable due to the fact that numerous calls were recorded on the same tape over a thirteen month period. The State presented the recollections of Sergeant Nessler, who made no contemporaneous notes that the conversations occurred at the times purported. This is not enough, and once the jury heard the recording, the trial

court should have granted the Defendant's motion for a mistrial. The contents of the tape were so prejudicial to the Defendant, that once the jury heard it, they could not help but be influenced by it. Even if the tape did not influence the jury, if it might have unlawfully influenced the jury, a mistrial should have been granted. *Woods, supra.* Because of the manifest necessity in this trial, the ends of justice were defeated by the denial of the mistrial. It is clearly established by the due process clause that an accused has a right to an impartial tribunal. As stated by Justice Black in *In re Murchison,* 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in a trial of cases. But our system of law has always endeavored to prevent *even the probability of unfairness.* (Emphasis added).

This constitutionally mandated requirement applies to both civil and criminal cases, and has been described by this Court as a "neutrality requirement in adjudicated proceedings." *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 243 (1980).

> The neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous, distorted conception of the facts or law. [See *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976)]

At the same time, it preserves both the appearance and the reality of fairness "generating the feeling so important to popular government that justice has been done." *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172 (1951). By playing the improperly admitted tape recordings to the jury, the Petitioner was denied his right to due process and a fair trial.

The Court has long recognized that due process requires that criminal defendants be "afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). This is precisely the opportunity that was denied Petitioner by the trial court by allowing the introduction of the tape recordings without a proper predi-

cate being laid. For these reasons, the Petitioner would respectfully submit that the Writ is due to be granted, and his conviction reversed.

B. Petitioner Was Denied Due Process of Law And The Right To A Fair And Impartial Tribunal By the State of Alabama's Improper Impeachment of the Defendant's Witness.

1. Facts.

The State of Alabama attempted to impeach the Defendant's witness, Claude Lynn Mabrey, by showing that he had been convicted of a crime involving moral turpitude. This is allowed under the *Code of Alabama,* 1975, Section 12-21-162. Mr. Mabrey, however, was not convicted of a crime involving moral turpitude.

2. Deprivation of Due Process And The Right To A Fair and Impartial Tribunal by the Improper Impeachment of the Defendant's Witness.

Conviction of a crime involving moral turpitude may be used to impeach a witness under the *Code of Alabama,* 1975, Section 12-21-162. The State attempted to impeach the Defendant's witness, Claude Lynn Mabrey, by showing that he had been convicted of attempting to possess cocaine. (Vol. I, R-83). Possession of cocaine is not a crime involving moral turpitude, however, according to Gamble, *McElroy's Alabama Evidence,* Section 145.01(9), (3d Ed. 1977), only sales of narcotics are crimes involving moral turpitude. *Gholston v. State,* 338 So.2d 454 (Ala.Cr.App. 1976); *McIntosh v. State,* 443 So.2d 1283 (Ala. 1983); *Neary v. State,* 469 So.2d 1321 (Ala.Cr.App. 1985). Mr. Mabrey was convicted of possession, and not selling narcotics, therefore, the State improperly used his prior conviction for impeachment purposes. Because Mr. Mabrey was improperly impeached, the Petitioner was denied due process and a fundamentally fair trial. For these reasons, the Petitioner respectfully submits that this Court should grant the Writ.

C. Petitioner was Denied Due Process of Law And The Right To A Fair And Impartial Tribunal By the State of Alabama Improperly Inquiring Into the Particulars of the Conviction of the Defendant's Witness.

1. Facts.

The Defendant's witness, Claude Lynn Mabrey, had been convicted of attempting to possess cocaine. (Vol. I, R-83). The State attempted to elicit facts and circumstances of Mr. Mabrey's conviction.

2. Deprivation of Due Process And The Right To A Fair And Impartial Tribunal By the Trial Court's Improperly Allowing the State of Alabama to go Beyond the Proper Line of Questioning By Asking the Defendant's Witness Details About His Conviction.

Eliciting facts and circumstances surrounding impeaching convictions is inadmissible. Gamble, *McElroy's Alabama Evidence,* Section 145.01(11), (3d 1977). Generally only questions involving the name of the crime, time and place of the conviction, and the punishment imposed are proper. *Wynn v. State,* 423 So.2d 294 (Ala.Cr.App. 1982); *Favor v. State,* 389 So.2d 556 (Ala.Cr.App. 1980); *Conley v. State,* 354 So.2d 1172 (Ala.Cr.App. 1977); *White v. State,* 347 So.2d 566 (Ala.Cr.App. 1977). The State, however, went beyond the proper line of questioning by asking Mr. Mabrey about details of his conviction. (Vol. I, R-100 to R-102). Defendant's counsel objected to the materiality and relevancy of the line of questioning attempted by the State, but the trial court overruled the objection. (Vol. I, R-101). The trial court committed reversible error by allowing the State to cross examine Mr. Mabrey as to specific acts of misconduct which had no relevancy. The State was using the details to try to show that Mr. Mabrey is a person of bad character as a whole. This method of impeachment is not allowed under Alabama law, and the trial court's failure to sustain the defendant's objection was reversible error.

The State, by being allowed to question the Defendant's witness about particular circumstances surrounding his prior

conviction, denied the Petitioner due process and a fair trial. Defense counsel had already elicited the only facts and circumstances admissible regarding the witness' conviction. Any futher questioning by the State of Alabama was improper, and prejudiced the Petitioner's case and the jury against the Petitioner to such an extent that he was denied due process and the right to an impartial jury.

CONCLUSION

For these reasons, both separately and severally, and to prevent a miscarriage of justice, Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court.

Respectfully submitted,

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COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205) 261-4590

7th Div. 64

ETOWAH Circuit Court
CC 87-275-R

KENNETH KEEL, ALIAS *Appellant* vs. State of Alabama *Appellee*

Dear Sir:

You are hereby notified that on March 17, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record of appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

XXX **Affirmed** on appeal. **No opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

/s/ Mollie Jordan

CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

April 14, 1989

MOLLIE JORDAN
Clerk
(205) 261-4590

7 Div. 64

ETOWAH Circuit Court
CC# 87-275-R

KENNETH KEEL, ALIAS *Appellant* vs. State of Alabama *Appellee*

Dear Sir:

You are hereby notified that on April 14, 1989, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record of appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

_____ **Affirmed** on appeal. **No opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

XXX Application for rehearing **overruled. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

/s/ Mollie Jordan

CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

A-5

JUN 16 1989

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1988-89

Ex Parte: Kenneth Keel

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Kenneth Keel
88-968 v.
State of Alabama)

(Etowah Circuit Court, CC-87-275-R)

PER CURIAM.

The petitioner has not complied with Rule 39(k), A.R.App.R., and no opinion was issued by the Court of Criminal Appeals. On the authority of *Ex parte Save Our Streams, Inc.*, 541 So. 2d 549 (Ala. 1989), we will not issue the writ of certiorari, and we express no opinion regarding the merits of the petitioner's claims.

WRIT DENIED.

Hornsby, C. J., and Maddox, Almon, Adams, and Steagall, JJ., concur.

IN THE
COURT OF CRIMINAL APPEALS
OF ALABAMA

7th DIV. 64

STATE OF ALABAMA

vs.

KENNETH KEEL

Defendant/Appeallant

Case No. CC87-275-R

Appealed from Etowah County Circuit Court

Sixteenth Judicial Circuit of Alabama

BRIEF OF APPELLANT

DAVID S. LUKER
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ARGUMENT

ISSUE I

I. DID THE TRIAL COURT ERR IN OVERRULING THE DEFENDANT'S OBJECTION TO THE ADMISSIBILITY OF TAPE-RECORDED CONVERSATIONS ALLEGEDLY BETWEEN THE DEFENDANT AND A CONFIDENTIAL INFORMANT?

Sound recordings are generally admissible as corroborative of oral testimony, if they contain relevant evidence. *Wright v. State,* 38 Ala.App. 64, 72, 79 So.2d 66, 73, *cert. denied,* 262 Ala. 420, 79 So.2d 74 (1954). However, sound recordings are only admissible if the proper foundation has been laid for their admission. *Voudrie v. State,* 387 So.2d 248 (Ala.Cr.App.), *cert. denied,* 387 So.2d 256 (Ala. 1980); Gamble, *McElroy's Alabama Evidence* Section 123.02 (3d ed. 1977). Guidelines for testing the admissibility of sound recordings was outlined in *Voudrie, supra*:

> (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recordings, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

Proper safeguards must also be "shown to have been used so as to protect the recording against error or spoliation and the speakers recorded are properly identified and adequate safeguards are taken to insure authenticity." *Walker v. State,* 416 So.2d 1083 (Ala.Cr.App. 1982), citing *Fikes v. State,* 263 Ala. 89, 81 So.2d 303, 311 (1955) *rev'd. on other grounds,* 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).

In this case, the State failed to lay the proper predicate to use the tape recordings allegedly made of the Defendant and a cocaine buyer. They are, therefore, inadmissible and the

trial court is due to be reversed. The State attempted to use the tape recordings to impeach and/or refresh the recollection of the Defendant, (Vol. 1-R-127, R-133). Defendant's counsel objected numerous times to the use of the tapes for any purpose whatsoever (Vol. 1-R-128, 129, 130, 131, 132, 133-134, 148, 150, 154, 156, 161-164, 174, 186, 188, 190, 193, 197). The trial court, however, overruled the Defendant's objection and allowed the tape recording to be played (Vol. 1-R-174). Although the State attempted to lay a predicate, it failed to meet the requisites of *Voudrie, supra.* Specifically, the State failed to show (1) that the recording device was capable of taking testimony, (2) that the operator was competent, (3) the authenticity and correctness of the recording, and (4) that changes, additions or deletions had not been made. No statement was ever made as to how the recorder worked, how it was hooked up, or whether it was working properly. The competency of Sergeant Nessler was never stated either. We have no way of knowing if or how he was trained to use the equipment, or his experience in using it. Because no contemporaneous records were kept, (Vol. 1-R-146), there is also no means of establishing the authenticity or correctness of the recording, including any changes, additions, or deletions that may have been made. Sergeant Michael Nessler failed to keep a log of transactions recorded on the tape. There is no indication who was called, on what date or who dialed the number. There is no record of who were the parties recorded or even what number was dialed. We only have Sergeant Nessler's memory of what went on and when. Therefore, the authenticity and correctness of the tape cannot be proven. Although the State did show the manner of the preservation of the recording, what they showed was inadequate, because the tape in question stayed in the recorder for a thirteen-month period before it was ever placed in the sole custody of Sergeant Michael Nessler. Other recordings were made on the same tape over this thirteen-month period, and other people had access to the tape and recording equipment, (Vol. 1-R-147 and R-178 to R-180). It was not, therefore, protected against error or spoliation as required by *Walker, supra.*

Because the State failed to lay the proper predicate for the admission of the tape as required by *Voudrie, supra,* the trial court erred in overruling the Defendant's objection to it being used. Further, the tape is untrustworthy because of the thirteen-month period when it was accessible to other people and not shown to have been protected from error or spoliation as required by *Walker, supra.* The trial court is, therefore, due to be reversed.

ARGUMENT

ISSUE II

II. DID THE TRIAL COURT ERR BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR A MISTRIAL?

A trial court has authority under *Code of Alabama*, Section 12-16-233 (1975) to enter a judgment of mistrial "when, in the opinion of the court or judge, there is a manifest necessity for the discharge or when the ends of justice would otherwise be defeated." The trial court has wide discretion in determining whether incidents occurring during the trial affect the rights of the parties to a fair trial. *Woods v. State,* 367 So.2d 982 (Ala. 1978); *Chillous v. State,* 405 So.2d 58 (Ala.Cr.App. 1981). The trial court in this case, however, abused its discretion by denying the Defendant's motion for a mistrial (Vol. 1-R-196). Defendant's counsel moved for a mistrial after the trial court allowed the State to play a tape recording of alleged conversations between the Defendant and a cocaine buyer (Vol. 1-R-188 to 196). No proper predicate was laid for the use of the tape recordings, so its authenticity is doubtful. Because of this lack of credibility and improper predicate, the Defendant objected to the use and content of the recording as being immaterial, irrelevant and misleading to the jury. In addition, the contents of the tape were inflammatory and extremely prejudicial to the Defendant. All the State presented was a tape of alleged phone calls between the Defendant and a cocaine buyer, with no indication of proof as to the dates of the calls, who the

calls were between, and what they were in reference to. Sergeant Nessler did not make a log of the phone calls and there is no way to determine when the calls were made or who they were to. This is completely unreliable due to the fact that numerous calls were recorded on the same tape over a thirteen-month period. The State just presented a recollection of Sergeant Nessler, who made no contemporaneous notes, that the conversations occurred at the time he says they did. This is not enough, and once the jury heard the recordings, the trial court should have granted the Defendant's motion for mistrial. The contents of the tape were so prejudicial to the Defendant that once the jury heard it, they could not help but be influenced by it. Even if the tape did not influence a juror, if it *might* have unlawfully influenced a juror, a mistrial should have been granted. *Woods, supra.* Because of the manifest necessity for the mistrial, the trial court is due to be reversed. Otherwise, the ends of justice would be defeated.

ARGUMENT

ISSUE III

III. DID THE TRIAL COURT ERR BY OVERRULING THE DEFENDANT'S OBJECTION TO THE STATE GOING INTO DETAILS OF THE PRIOR CONVICTION OF THE DEFENDANT'S WITNESS?

The State attempted to impeach the Defendant's witness, Claude Lynn Mabrey, by showing he had been convicted of a crime involving moral turpitude. This is allowed under *Code of Alabama,* Section 12-21-162 (1975). Mr. Mabrey, however, was convicted of attempting to possess cocaine (Vol. 1-R-83). That is not a crime involving moral turpitude according to Gamble, *McElroy's Alabama Evidence,* Section 145.01(9) (3d ed. 1977). Only *sales* of narcotics are crimes involving moral turpitude. *Gholston v. State,* 338 So.2d 454 (Ala.Cr.App. 1976); *McIntosh v. State,* 443 So.2d 1283 (Ala. 1983); *Neary v. State,* 469 So.2d 1321 (Ala.Cr.App. 1985). Because Mr. Mabrey was convicted of possession and not selling narcotics,

the State improperly used his prior conviction for impeachment purposes.

The State also went into the particulars of Mr. Mabrey's conviction over the objection of the Defendant. Particulars of the impeacing conviction are inadmissible. Gamble, *McElroy's Alabama Evidence,* Section 145.01(11) (3d ed. 1977). Generally, only questions involving the name of the crime, time and place of the conviction and the punishment imposed are proper. *Wynn v. State,* 423 So.2d 294 (Ala.Cr.App. 1982); *Favor v. State,* 389 So.2d 556 (Ala.Cr.App. 1980); *Conley v. State,* 354 So.2d 1172 (Ala.Cr.App. 1977); *White v. State,* 347 So.2d 566 (Ala.Crim.App. 1977). The State, however, went beyond the proper line of questioning by asking Mr. Mabrey about details of his conviction (Vol. 1-R-100 to 102). Defendant's counsel objected to the materiality and relevancy of the line of questioning, but the trial court overruled the objection (Vol. 1-R-101). The trial court committed reversible error by allowing the State to cross-examine Mr. Mabrey as to specific acts of misconduct which have no relevancy. The State was using the details to try to show that Mr. Mabrey is a person of bad character as a whole. This method of impeachment is not allowed under Alabama law. Gamble, *McElroy's Alabama Evidence,* Section 140.01(10) (3d ed. 1977); *Turner v. State,* 380 So.2d 393 (Ala.Crim.App. 1980). The trial court's failure to sustain the Defendant's objection, therefore, is reversible error.

IN THE
SUPREME COURT OF ALABAMA

S.C. NO. _____

EX PARTE:

KENNETH KEEL,

Petitioner,

IN RE:

KENNETH KEEL,

Appellant,

vs.

THE STATE OF ALABAMA

Appellee.

ON APPEAL FROM THE
ETOWAH COUNTY CIRCUIT COURT
SIXTEENTH JUDICIAL CIRCUIT OF ALABAMA
(CASE NO. CC 87-275-R)

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE
COURT OF CRIMINAL APPEALS OF ALABAMA
(7 Div. 64)

DAVID S. LUKER
ATTORNEY FOR APPELLANT
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

Comes now your Petitioner, Kenneth Keel, by and through his undersigned attorney, and petitions this Honorable Court for a Writ of Certiorari to issue to the Honorable Court of Criminal Appeals of Alabama in the above styled cause pursuant to Rules 39 and 41 of *Alabama Rules of Appellate Procedure,* and as grounds therefore, shows the following:

1. That the Petitioner was convicted of the unlawful sale of controlled substances, a violation of the *Code of Alabama,* (1975), Section 20-2-70 in Case No. CC 87-275-R. The Petitioner was sentenced to twelve (12) years in the penitentiary, a Two Thousand Five Hundred Dollars ($2,500.00) fine, Five Hundred Dollars ($500.00) to the Victim Crime Assessment Fund, and One Hundred Dollars ($100.00) restitution. The Court of Criminal Appeals affirmed the Petitioner's conviction on March 17, 1989, *without opinion.* The Petitioner filed an Application for Rehearing pursuant to Rules 39, 40 and 41 of the *Alabama Rules of Appellate Procedure* on March 29, 1989. The Court of Criminal Appeals overruled the Petitioner's Application for Rehearing on April 14, 1989, *without opinion.*

2. A copy of the opinion of the intermediate Appellate Court is attached to this Petition, which shows the Court of Criminal Appeals number to be 7th Division 64 (see Exhibit A, attached hereto).

3. Pursuant to Rule 40 of the *Alabama Rules of Appellate Procedure*, and the decision of the Court of Criminal Appeals in *Cox v. State,* 380 So.2d 384 (Ala.Cr.App. 1980), Keel resubmitted his original brief for consideration in support of his Application for Rehearing by reassigning the issues of the denial of a fair trial based on the improper admission of a tape recorded conversation allegedly between the Defendant and a confidential informant, and of the State improperly going into the details of the prior conviction of the Defendant's witness.

4. Pursuant to the *Alabama Rules of Appellate Procedure*, the Petitioner filed an Application for Rehearing assigning two errors by the intermediate Appellate Court and attached Additional Argument in his Application for Rehearing.

5. The basis of the Petition is as follows:

A.

Pursuant to Rule 39(c)4 of the *Alabama Rules of Appellate Procedure*, the Petitioner asserts that the issues raised in Section I of his Brief on Appeal, but not addressed by the intermediate Appellate Court, because of the affirmance *without opinion*, is in direct conflict with opinions of the Court of Criminal Appeals in *Voudrie v. State*, 387 So.2d 248 (Ala.Cr.App.), *cert. denied*, 387 So.2d 256 (Ala. 1980); *Walker v. State*, 416 So.2d 1083 (Ala.Cr.App. 1982); and *McElroy's Alabama Evidence*, Section 123.02 (3d ed. 1977).

In this case, the State failed to lay the proper predicate to use a tape recorded conversation allegedly made between the Defendant and the cocaine buyer. The Defendant's counsel objected numerous times to the use of the tape for any purpose whatsoever. The trial court overruled the Defendant's objection, and allowed the tape recording to be played. The tape recording was overall of poor quality, and the same tape was used over a thirteen (13) month period to record other phone conversations. Although the State attempted to lay a predicate, it failed to meet the requisites of *Voudrie, supra*. Specifically, the State failed to show:

1. That the recording device was capable of taking testimony,
2. that the operator was competent,
3. the authenticity and correctness of the recording, and
4. that changes, additions or deletions had not been made.

The State never attempted to show how the recorder worked, how it was hooked up, or whether it was working properly. No extemporaneous records were kept, nor was the competency of the operator ever shown. There was no log to show what transactions were recorded on the tape, no indication of who was called, on what date, or who dialed the

number. In several places, it was inaudible, and had to be listened to two or three times before it could be understood. The Petitioner asserts that he was prejudiced by the introduction of this tape because the State failed to lay the proper predicate, or meet the requisites of *Voudrie, supra.* This cause is, therefore, due to be reversed and remanded.

B.

Pursuant to Rule 39(c)(4) of the *Alabama Rules of Appellate Procedure,* the Petitioner asserts that the issue raised on appeal in Section III of his Brief, but not addressed because of the affirmance *without opinion,* is in direct conflict with the decisions in *Gholston v. State,* 338 So.2d 454 (Ala.Cr.App. 1976); *McIntosh v. State,* 443 So.2d 1283 (Ala. 1983); *Neary v. State,* 469 So.2d 1321 (Ala.Cr.App. 1985); *Wynn v. State,* 423 So.2d 294 (Ala.Cr.App. 1982); *Favor v. State,* 389 So.2d 556 (Ala.Cr.App. 1980); *Conley v. State,* 354 So.2d 1172 (Ala.Cr.App. 1977); *White v. State,* 347 So.2d 566 (Ala.CR.App. 1977); and *McElroy's Alabama Evidence,* Section 145.01(9) and (11) and Section 140.01(10) (3d ed. 1977).

The State attempted to impeach the Defendant's witness, Claude Lynn Mabrey, by showing that he had been convicted of a crime involving moral turpitude. This is allowed under the *Code of Alabama,* (1975), Section 12-21-162. Mr. Mabrey, however, was convicted of attempting to possess cocaine, which is not a crime involving moral turpitude, according to *McElroy's Alabama Evidence,* Section 145.01(9) (3d ed. 1977). Only *sales* of narcotics are crimes involving moral turpitude, *possession* is not. Because Mr. Mabrey was convicted of possession, and not selling, the State improperly used his prior conviction for impeachment purposes.

The State also went into the particulars of Mr. Mabrey's convictions over the objection of the Defendant. Particulars of the impeaching conviction are inadmissible according to *McElroy's Alabama Evidence,* Section 145.01(11) (3d ed. 1977). Generally, only questions involving the name of the crime, the time and place of the conviction, and the punishment imposed are proper. The State went beyond this proper line

of questioning by asking Mr. Mabrey details about his conviction. The Defendant's counsel objected to the materiality and relevancy of this line of questioning, but was overruled by the trial court. The trial court, therefore, admitted reversible error by allowing the State to cross-examine Mr. Mabrey as to specific acts of misconduct, and by using details to show that Mr. Mabrey was a person of bad character as a whole. Because this method of impeachment is not allowed under Alabama law, the Defendant's conviction is due to be reversed and remanded.

WHEREFORE, above premises considered, the Petitioner respectfully prays that the Writ of Certiorari be granted, and that this Honorable Court proceed under its rules to review the matters complained of, and to reverse the judgment of the Court of Criminal Appeals; that this Court exercise its superintendent authority over the intermediate Appellate Court to review the law as applied to the facts pursuant to the *Alabama Rules of Appellate Procedure,* and to exercise this Court's responsibility to review the erroneous treatment of the Petitioner's properly raised Constitutional issues omitted by the intermediate Appellate Court. The Petitioner prays for such other relief as to which he may be entitled.

I hereby certify that I have served copies of this Petition and the Brief in support thereof as required by Rule 39(e), *Alabama Rules of Appellate Procedure,* this the 28th day of April, 1989.

RESPECTFULLY SUBMITTED:

/s/ David S. Luker

DAVID S. LUKER
ATTORNEY FOR PETITIONER
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Petition of Certiorari upon the Honorable Don Siegelman, Attorney General for the State of Alabama, via U.S. Mail, postage paid and properly affixed this the 28th day of April, 1989.

/s/ David S. Luker

DAVID S. LUKER